

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

MANSFIELD File No. BPED-920324JQ
CHRISTIAN SCHOOL File No. BPED-911120IB

For Consent to the Reinstatement of
Construction Permit and Modification
of the Construction
Permit of WPJV(FM), Williard, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 1995; Released: November 15, 1995

By the Commission:

1. The Commission has before it an unopposed application for review filed on March 8, 1995 by Mansfield Christian School ("Mansfield"). Mansfield seeks Commission review of a February 6, 1995 letter ruling ("Bureau Letter") by the Chief, Audio Services Division, Mass Media Bureau ("Bureau"). That action denied reconsideration of the Commission staff's prior denial of Mansfield's above-captioned application for reinstatement of construction permit and its dismissal of the above-captioned application to modify the WPJV(FM) facilities as moot.¹ As set forth below, we deny Mansfield's application for review.

BACKGROUND

2. On July 3, 1990, the Commission granted the assignment of the subject construction permit from Pioneer Joint Vocational School to Mansfield (File No. BAPED-890517HT).² The parties consummated that assignment on August 24, 1990. The subject construction permit expired on August 24, 1991. Mansfield did not file an application to extend the construction permit prior to its expiration. On November 20, 1991, however, nearly three months after expiration of the permit, Mansfield filed an FCC Form 301 application to modify the facilities authorized by the now-expired construction permit. By letter dated March 9, 1992, the Commission staff informed Mansfield that the modification application could not be processed absent a showing that reinstatement of the expired construction permit was justified. Mansfield subsequently filed the above-captioned application seeking reinstatement of the construction permit. Mansfield attributed the failure to timely file an extension application to "inadvertent error." In support of its extension request, Mansfield stated

The funding is in place to build the station pursuant to the modification. However, no equipment has been ordered pending the grant of the modification application. The applicant does not intend to build the station in accordance with the subject construction permit and thus filed the pending modification application.

By letter dated July 28, 1992 ("Staff Letter"), the Commission staff denied Mansfield's reinstatement application and dismissed the modification application as moot. The Staff Letter found that Mansfield failed to satisfy the Commission's standard for extension of a construction permit under 47 C.F.R. § 73.3534(b).³ The Staff Letter further found that Mansfield's justification for failing to timely file an extension application -- "inadvertent error" -- did not excuse the filing of the extension application after the subject permit's expiration.

3. On August 27, 1992, Mansfield filed a petition for reconsideration of the Staff Letter stating that the Staff Letter was "arbitrary and capricious." Specifically, Mansfield claimed that upon notice that the subject permit had expired, it had "promptly" filed an extension application. Mansfield also stated that, in an effort to take advantage of the rule changes permitting facility upgrades, it had undertaken "extensive engineering studies" and had located a "suitable transmitter site." Mansfield further argued that the Staff Letter's conclusion that substantial progress had not been made was "at odds with the facts on record." The Bureau Letter denied Mansfield's petition for reconsideration. The Bureau Letter pointed out that Mansfield had taken "virtually no steps towards constructing the station." Citing *Panavideo Broadcasting, Inc.*, 6 FCC Rcd 5259 (1991), the Bureau Letter noted that Mansfield's decision to seek a facilities upgrade instead of building the authorized facilities was a "private business decision" that did not justify a construction permit extension. The Bureau Letter further noted that, in accordance with *Reverend James Vaughan*, 2 FCC Rcd 2549 (1987), the filing of the modification application three months after the construction permit's expiration did not provide a basis upon which the Commission could extend the permit.

4. In its application for review, Mansfield appeals the Bureau Letter on three grounds. First, Mansfield contends that the Bureau Letter is "in conflict with established Commission policy" of encouraging the growth of noncommercial broadcasting. To this end, Mansfield states that "[w]hen the Commission modified its rule to increase the operating power of Class A FM stations, [Mansfield] promptly sought authority to implement such a power increase for WPJV in order to maximize the service area of the station." Mansfield argues that it is "unreasonable" for the Commission to expect Mansfield to build a 3 kW facility at one site "while it has an application pending to up-grade the power and coverage of that station from a second site." Second, Mansfield alleges that the Bureau Letter raises "a question of policy which has not been previously resolved by the Commission." Specifically, Mansfield argues that because the Commission did not change the rules permitting 3 kW Class A FM stations to apply for 6 kW facilities, In re Amendment of Part 73 of

¹ Mansfield is also the licensee of noncommercial station WMVC(FM), Mansfield, Ohio.

² The WPJV(FM) construction permit authorizes facilities with

3 kW on Channel 245A from 94.8 meters height above average terrain.

³ That rule is set forth in paragraph 5, *infra*.

the Rules, *Second Report and Order* ("Second Report and Order"), 4 FCC Rcd 6375 (1989), until after the above-referenced application assigning WPJV(FM) to Mansfield had been filed, it is "inherently unreasonable for the Bureau to insist that [Mansfield] incur the costs of constructing the [3 kW] facility for WPJV as a *quid pro quo* for receiving a construction permit for that station to operate with [6 kW] from an entirely separate transmitter site." Mansfield contends that it "acted diligently" in undertaking engineering studies and finding a suitable site from which to build a 6 kW facility. Finally, Mansfield claims that, contrary to the Bureau Letter's finding that there had been no significant progress toward construction, Mansfield had "undertaken extensive engineering studies," "secured a transmitter site" and "purchased studio equipment." Mansfield further contends that it "had taken all steps possible to place WPJV into operation while waiting for Commission action on the [6 kW] up-grade application.

DISCUSSION

5. When contemplating applications for extension of construction permits, the Commission examines the record to determine whether the permittee's application satisfies one of the three factors set forth under 47 C.F.R. § 73.3534(b). That subsection provides, in pertinent part, that the Commission will grant an application for extension where a permittee can show that: (a) construction is complete and testing is underway; or (b) substantial progress has been made (*i.e.*, demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion); or (c) no progress has been made for reasons clearly beyond the control of the permittee (such as delays caused by governmental budgetary processes and zoning problems) and the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction. *See* 47 C.F.R. § 73.3534 (b). We have noted that "[i]mplicit in this requirement is the fact that a permittee's extension application will be judged according to the progress made during the most recent construction period." *See Panavideo Broadcasting, Inc.*, 6 FCC Rcd 5259, 5259 (1991). In *Panavideo*, we also pointed out that because each extension application presents different facts, "some situations might warrant several extensions over a period of years where a permittee continues to make steady progress, while another permittee might not justify even a first extension." *Id.* at 5260. The latter situation is present in this case, as Mansfield's application does not provide a basis for a first extension under the two relevant factors of 47 C.F.R. § 73.3534(b).⁴

6. Mansfield's claim that the Commission's action in the *Second Report and Order* made construction of either a 3 kW or 6 kW facility "unreasonable" is not supported by the record. Regarding the 3 kW facility, Mansfield cannot point to any factor that prevented its construction of a 3 kW facility because, as Mansfield has stated in its extension application, it did not intend to build its authorized facility. Second, with respect to the 6 kW facility, Mansfield had adequate notice of the applicable rule change permitting upgrades. The Commission released the *Second Report and Order* on August 18, 1989 and, as of October 2, 1989, applicants could request 6 kW upgrades under the

Commission's revised rules. *See Second Report and Order* 4 FCC Rcd 6375, 6382 (1989). Nine months after the release of the *Second Report and Order*, on July 3, 1990, the Commission granted the assignment of the subject construction permit to Mansfield. Mansfield, however, did not file its upgrade application until November 20, 1991, more than two years after the release of the *Second Report and Order*, sixteen months after Mansfield had acquired the permit, and three months after the permit's expiration. Therefore, we conclude that the Bureau correctly determined that nothing in the record indicates that construction of the authorized facility, or the preparation of a timely and conforming modification application was in any way beyond Mansfield's control. *See* 47 C.F.R. § 73.3534(b)(3).

7. Also, the record does not support Mansfield's claim that an extension is justified on the basis that substantial progress has been made. *See* 47 C.F.R. § 73.3534(b)(2) (demonstration that equipment is on order or on hand, site acquired, site cleared and construction proceeding toward completion). Mansfield's proffered progress -- engineering studies and site acquisition -- were efforts directed to securing a modification of the permit's facilities and were not steps taken towards construction of the authorized facility. In any event, Mansfield's actions with respect to preparing an application to modify the facility are not relevant to evaluating Mansfield's construction efforts of the authorized facility during the relevant construction period, especially where the applicant has taken no other steps towards constructing the authorized facilities. *See Panavideo, supra*; *see also Community Service Telecasters, Inc.*, 6 FCC Rcd 6026, 6030 (1991) (funds spent prosecuting modification applications will not be considered "risky funds" when evaluating permittee's progress in constructing its authorized facilities). Furthermore, we find that Mansfield's cited acquisition of "studio equipment" is of little probative value in determining whether substantial construction progress has been made. First, we note that Mansfield raises the acquisition of this equipment for the first time in its application for review and it directly contradicts Mansfield's prior statement in the subject extension application "that no equipment has been ordered." Moreover, because Mansfield indicates that the alleged equipment is currently being used by co-owned WMVC(FM), we cannot attribute it to the WPJV(FM) construction. Therefore, we conclude that the Bureau correctly found that Mansfield did not demonstrate substantial progress in constructing the authorized facility under 47 C.F.R. § 73.3534(b)(2).

8. Accordingly, IT IS ORDERED, that the application for review filed on March 8, 1995 by Mansfield Christian School IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

⁴ Mansfield does not assert that it is entitled to an extension under the first factor, *i.e.*, construction is complete and that

testing is underway. *See* 47 C.F.R. § 73.3534(b)(1).